

July 11, 2002

RECOMMENDATIONS TO THE SELECT COMMITTEE ON
HOMELAND SECURITY

[concerning H.R. 5005]

The Committee on Appropriations, to whom was referred the bill (H.R. 5005) to establish the Department of Homeland Security, and for other purposes, having considered the same, report thereon with its recommendations and views on the bill. In this opinion, the Committee has limited its specific textual recommendations to matters within the jurisdiction of the Committee on Appropriations, and for other matters, the Committee remains descriptive in those matters in which the Committee has expertise to lend.

The Committee believes that the enactment of H.R. 5005, as introduced, would constitute a major erosion of the separation of powers as established in the United States Constitution, abrogating the central role of the Congress -- the direction and oversight of public expenditures. The bill would provide the Secretary of the Department of Homeland Security with extraordinary and unprecedented powers that would in effect be both legislative and executive in nature and undermine the fundamental precept of the founding fathers, "checks and balances."

The Committee has been in the forefront of strengthening the nation's capacity to identify, find and destroy terrorist organizations and to enhance our nation's defenses and capacity to respond to terrorist attacks. We strongly support efforts to streamline, centralize and improve the management and efficiency of the nation's counter-terrorism and homeland security activities. The importance of attaining these goals, however, need not involve sacrificing the constitutional processes that have remained intact for more than two centuries and have served the nation well during foreign invasions, civil war and two world wars. In fact, the current administrative morass troubling a number of key homeland security agencies would argue for even more intense Congressional scrutiny and oversight.

For those matters within the jurisdiction of the Committee on Appropriations, the Committee recommends that the bill, H.R. 5005, be amended, with an amendment as follows:

Page 38, strike lines 19 through 22 and insert the following:

“(4) shall deposit the proceeds of any exercise of the authority granted by this subsection into the miscellaneous receipts of the Treasury in accordance with section 3302(b) of title 31, United States Code.”.

Page 39, strike lines 5 through 14.

Page 39, line 15, strike “; TRANSFER”.

Page 39, line 16, strike “(a) ALLOCATION OF FUNCTIONS.—”.

Page 40, strike lines 6 through 13.

Page 42, beginning on line 12, strike “or non-reimbursable”.

Page 42, strike lines 15 through 22.

Page 42, line 23, strike “(d)” and insert “(c)”.

Page 43, line 20, strike “(e)” and insert “(d)”.

Page 44, beginning on line 2, strike “and” the second place it appears and all that follows through “Code” on line 4.

Page 44, after line 10, insert the following new subsections:

“(e) USE OF TRANSFERRED FUNDS.—Except as may be provided in an appropriation Act pursuant to subsection (g), balances of appropriations and any other funds transferred pursuant to this Act shall—

“(1) be available only for the purposes for which they were originally available; and

“(2) remain subject to the same conditions and limitations provided by the law originally appropriating or otherwise making available the amount, including limitations and notification requirements related to the reprogramming of appropriated funds.

“(f) NOTIFICATION REGARDING TRANSFERS.—The President shall notify Congress at least 15 days in advance of any transfer of appropriations balances or other funds pursuant to this Act.

“(g) ADDITIONAL USES OF FUNDS DURING TRANSITION.—During the transition period and provided that the Committees on Appropriations are notified at least 15 days in advance, amounts transferred to or otherwise made available to the Department may be used for purposes in addition to those for which they were originally available (including by transfer among accounts of the Department), but only to the extent such transfer or use is specifically permitted in advance in an appropriation Act and only under the conditions and for the purposes specified in such appropriation Act.”.

Page 47, strike lines 12 through 19.

COMMITTEE PERSPECTIVE ON PROVISIONS OF H.R. 5005 WITHIN THE
JURISDICTION OF THE COMMITTEE ON APPROPRIATIONS

H.R. 5005 was referred to the Select Committee on Homeland Security, and in addition to several permanent committees, including the Committee on Appropriations, in each case for consideration of such matters as fall within the jurisdiction of the committee concerned. For the Committee on Appropriations, the matters within its jurisdiction are transfers of certain authorities and appropriations and unobligated and unexpended balances of previous appropriations.

Specifically, H.R. 5005 includes:

1. the general transfer of several agencies, such as the Coast Guard, Secret Service, the Federal Emergency Management Agency, etc., to the new department and calls for the transfer of “functions, personnel, assets and liabilities”. The legislation defines “assets” to include (among other items) “unobligated or unexpended balances of appropriations, and other funds and resources”.
2. broad powers to help finance the operations of the new department. Subsections (d) through (f) of section 732 authorize the Secretary of Homeland Security to acquire real estate and sell or exchange assets owned by the Department, and to raise funds by leasing or subleasing property owned or leased by the Department. The proceeds raised through these arrangements would be available for any purpose of the Department, without the need for appropriation or other congressional action. These amounts could be substantial, as the Department would acquire control over considerable property when it absorbs agencies such as the Coast Guard, the Animal and Plant Health Inspection Service, and various laboratories. The broad authorities granted are contrary to longstanding principles of existing law which requires governmental receipts to be deposited in the Treasury and spent only pursuant to appropriations – except where Congress has authorized specific uses.
3. section 733(b) which provides the Secretary of the new department the permanent authority to transfer up to five percent of any

appropriation available to the secretary in any fiscal year to any other appropriation (on 15 days' notice to the Appropriations Committees). No Congressional approval is required. This provision could allow transfers of \$2 billion or more.

4. authority in section 803(c) which allows the President to transfer to the new department up to five percent of the unobligated balances available to any agency being moved to the new department before the move takes place. The amounts transferred would then be available to finance any of the purposes of the new department, without regard to the purposes for which they were originally appropriated. In other words, the new department could start its operations with initial funding of \$1 billion or more, provided not through an appropriation for that purpose, but rather through a five percent surcharge against appropriations made for agencies such as the Coast Guard, the Customs Service, and the Federal Emergency Management Agency. Again, no Congressional approval is required.
5. section 803(e), a provision that provides that upon the transfer of an agency to the new Department, the personnel, assets and liabilities of the agency shall be transferred to the Secretary for appropriate allocation, subject only to the approval of the Director of the Office of Management and Budget. This section would expressly override the provision of permanent law (31 U.S.C. 1531(a)(2)) that requires funds transferred under such circumstances (that is in connection with transfers of functions) be used only for the purposes for which the appropriation was originally available.
6. section 806, which authorizes the director of the Office of Management and Budget to make additional and incidental dispositions of personnel, assets, and liabilities in connection with the functions transferred in the Act, as he determines appropriate.

These transfer provisions are overly broad and sweeping. If enacted, they could have a serious impact on the appropriations process, hinder Congress in the exercise of its constitutional duty to direct the expenditure of public funds, and erode the role of Congress as established under Article I of the Constitution. They would have the effect of vitiating and rendering as

irrelevant annual appropriations levels established by Congress for specific individual programs and would undermine Congressionally-imposed restrictions and program allocations. As a matter of fact, H.R. 5005 would provide the Secretary of the new department the ability to unilaterally rewrite fiscal year 2003 and perhaps some of fiscal year 2004 appropriations relating to both homeland security and to all other functions (such as other missions of the Coast Guard) that he wishes to shift to the new department. This would amount to giving the Secretary of Homeland Security an unrestricted lump-sum appropriation in an amount that could exceed \$30 billion. Moreover, this transfer authority would be available in perpetuity.

EXPLANATION OF THE PROPOSED AMENDMENT

The Committee recommends that the bill, H.R. 5005, be amended as follows:

Page 38, strike lines 19 through 22 and insert the following:

“(4) shall deposit the proceeds of any exercise of the authority granted by this subsection into the miscellaneous receipts of the Treasury in accordance with section 3302(b) of title 31, United States Code.”.

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Page 44, after line 10, insert the following new subsections:

“(e) USE OF TRANSFERRED FUNDS.—Except as may be provided in an appropriation Act pursuant to subsection (g), balances of appropriations and any other funds transferred pursuant to this Act shall—

“(1) be available only for the purposes for which they were originally available; and

“(2) remain subject to the same conditions and limitations provided by the law originally appropriating or otherwise making available the amount, including limitations and notification requirements related to the reprogramming of appropriated funds.

“(f) NOTIFICATION REGARDING TRANSFERS.—The President shall notify Congress at least 15 days in advance of any transfer of appropriations balances or other funds pursuant to this Act.

“(g) ADDITIONAL USES OF FUNDS DURING TRANSITION.—During the transition period and provided that the Committees on Appropriations are notified at least 15 days in advance, amounts transferred to or otherwise made available to the Department may be used for purposes in addition to those for which they were originally available (including by transfer among accounts of the Department), but only to the extent such transfer or use is specifically permitted in advance in an appropriation Act and only under the conditions and for the purposes specified in such appropriation Act.”.

Page 47, strike lines 12 through 19.

The amendments recommended by the Committee remove the various extraordinary transfer authorities and budgetary powers that would be conferred on the executive branch by the bill as introduced. Instead, the Committee recommends relying on more traditional procedures, which allow funds to be transferred along with the organizations they finance but which require the executive to propose and obtain congressional approval to increase funding levels or change the uses of appropriated funds.

The Committee’s amendments leave intact the various provisions of the introduced bill (such as section 202) that provide for transfer to the Department of Homeland Security of the assets of the various federal entities being moved to the new department, and that define those assets as including unobligated or unexpended balances of appropriations. Similarly, the amendments leave in place the basic structure of section 803(e), which clarifies that the transfer of appropriations balances and other assets occurs at the time an organization is transferred to the Department of Homeland Security and that these balances are transferred to the Secretary of Homeland Security for appropriate allocation.

However, the Committee amendments strike the provision of the bill that expressly overrides provisions of permanent law requiring that funds transferred under such circumstances be used only for the purposes for which they were originally appropriated. Instead, the amendments specifically apply the basic principles found in sections 1531 and 1532 of title 31, United States Code, that transferred funds are available only for the same purposes and subject to the same limitations as applied prior to the transfer.

Thus, under the Committee amendments, when an organization such as the Immigration and Naturalization Service or the Secret Service is moved to the Department of Homeland Security, it would bring along its own funding in the form of the unobligated and unexpended balances of its appropriations. However, such appropriations would not normally be available to finance other operations of the new Department.

The Committee expects the Administration to prepare and propose to Congress a specific plan for financing those operations and needs of the Department of Homeland Security that do not represent simply the continuation of functions for which appropriations are already available. Such a plan could consist of any combination of appropriations transfers, new appropriations, rescissions and other measures as the Administration considers advisable. The Committee would expect to act expeditiously on any such proposal.

The process that would be established by H.R. 5005 as amended by the Committee is very similar to the process used when the Department of Energy was created in 1977 and when the Department of Education was created in 1979. In both cases, legislation establishing the new departments provided for transfer of appropriations balances along with the functions being transferred – but only for the purposes for which the funds were originally appropriated. In both cases, further transfers were allowed only to the extent specifically authorized in appropriations legislation.

The Committee understands the language contained in the bill (as amended) transferring appropriations balances and other assets to the Department of Homeland Security as applying only to the assets of the federal entities specifically transferred by sections 202, 302, 402, 502, and 720. Thus, nothing in the bill authorizes transfer of any portion of the appropriations balances of any agency, such as the National Institutes of Health or the Federal Aviation Administration, that is not transferred to the Department of Homeland Security in whole or in part by the bill. If the Administration wishes to shift to the Department of Homeland Security any part of the funds appropriated to an agency not being transferred, the Administration should propose the necessary specific appropriations legislation to Congress.

Specifically, the amendment recommended by the Committee:

- (1) eliminates provisions of section 732 authorizing the Secretary to use, without appropriation, the proceeds from sale or lease of Department property. Instead, the Committee alternative requires any such proceeds to be deposited in the Treasury, where they will be available for spending only by appropriation. The Committee also notes, that the General Services Administration already possesses authority to recover the direct and indirect costs of such sales under 40 U.S.C. 485, which may be available to the Secretary of Homeland Security under section 732(e) of the bill (requiring delegation of some GSA authorities to the Secretary). Thus, the Committee amendment should not unduly hamper any effort to dispose of the Department's surplus property.
- (2) deletes section 733(b) which provides that not to exceed five percent of any appropriation available to the Secretary of Homeland Security in any fiscal year may be transferred between appropriations provided that at least 15 days' notice is given the Appropriations Committees prior to the transfer. The Committee strongly believes that whether and in what amounts to grant sweeping transfer authority and the restrictions that should apply are matters that should and can be addressed through the annual appropriations process, rather than through a permanent blanket of general authority.
- (3) amends section 803(b), which allows agencies to provide services or detail personnel on a reimbursable or non-reimbursable basis to assist the transition. The Committee amendment deletes the authority to enter into non-reimbursable agreements.
- (4) deletes section 803(c) which provides that, prior to the actual transfer of an agency to the Department within the twelve-month transition period, the President is authorized to transfer to the Secretary of Homeland Security not to exceed five percent of the unobligated balance of any appropriation available to such agency, to fund the purposes authorized in the bill, provided that at least 15 days' notice is given the Appropriations Committee prior to the transfer. Additional uses of funds are addressed in a new subsection (g) to section 803.
- (5) amends section 803(e) which provides that transfers of personnel, assets, liabilities, and functions to the Department shall be available

for activities of the new department. The amendment strikes language that would override permanent law (31 U.S.C. 1531(a)(2)) which requires executive agencies to obligate funds only for the purposes for which they were appropriated.

(6) includes new subsections (e) through (g) to section 803 regarding the use and notification of appropriations and other funds transferred pursuant to provisions of this Act. These new provisions allow the limited transfer of appropriations and other funds when expressly provided in an annual appropriations Act. Such transfers are currently requested, contemplated and contained in such Acts. In addition, the new provisions provide that amounts transferred to or otherwise made available to the new department may be used for purposes in addition to those for which they were originally available, but only to the extent such transfer or use is expressly permitted in an appropriation Act.

(7) deletes section 806 which provides the Director of the Office of Management and Budget the authority to transfer “incidental” assets and personnel as he may deem appropriate.

MATTERS WHICH LESS DIRECTLY AFFECT THE COMMITTEE’S JURISDICTION

Coordination and resource requirements for counter-terrorism activities

The Committee is also concerned that at least some of the proposed reorganization of administrative authority expressed in H.R. 5005 will not improve the efficiency, coordination or effectiveness of the nation’s counter-terrorism and homeland security efforts. We would encourage the committees of jurisdiction to weigh carefully the following three principles:

First, does a proposed transfer of an agency or activity to the new department increase the focus and coordination of government counter-terrorism activities?

The organization chart of current government efforts in counter-terrorism that accompanied the Administration’s announcement of plans to create a new department indicates that there are approximately 133 programs and offices involved in the effort. H.R. 5005 would move less than two-dozen of these into the new department. This leaves the overwhelming

majority of such agencies and activities outside the proposed department – including some of the most critical government counter-terrorism efforts such as the FBI and the CIA. The question that must be asked in each instance is whether or not the inclusion of an activity within the department will not only improve departmental coordination of counter-terrorism but government-wide coordination.

By the same token, some proposed changes might give the new secretary such an unwieldy portfolio as to create serious distractions from the underlying mission. H.R. 5005 would place functions such as oil spill cleanups, pet store licensing, international adoptions, tariff collection and boll weevils eradication under the responsibility of the Secretary of Homeland Security. While the inclusion of some extraneous activities may be unavoidable given the variety of functions that many of the agencies proposed for the new department perform, having responsibilities as far ranging as those proposed in H.R. 5005 would likely increase administrative requirements, increase overhead expenditures and make it difficult for the leadership of the department to maintain a clear focus on security issues.

Second, will the structure proposed for managing the department create a demand for administrative resources that will reduce funds available for frontline activities such as container inspections or the identification, apprehension and deportation of illegal entrants that pose a possible terrorist threat?

In the defense community this question is referred to as the relationship between the tooth and the tail. It is easily possible to organize government activities in such a way that the cost of coordinating the activities becomes more expensive than the activities themselves. There is ample reason to be concerned that H.R. 5005 could seriously erode resources needed to sharpen the tooth.

This is particularly true if the administration maintains its stated intention to fund all activities of the department within the existing budgets for those activities. If that policy is followed, it will mean that most of the resources necessary to fund the activities of the Secretary, Deputy Secretary, five proposed Under Secretaries, as many as sixteen proposed Assistant Secretaries and six other proposed sub-cabinet positions will have to be met through cuts in border inspectors, immigration enforcement and first responders.

Thirdly, will the reorganization disrupt highly sensitive security functions during critical threat periods?

There is a reason that the Executive Reorganization Act of 1947 took place in 1947 and not 1944. The consolidation of the War Department and the Navy may have created more efficiency and better coordination of defense activities in the long term but it certainly had significant short-term costs with respect to both of these goals. Similar disruptions are inevitable in any reorganization.

The severity of such disruptions and time lost resulting from reorganization will vary based on the amount of administrative change envisaged for a particular program or activity. Simply changing the chain of command involves a relatively small loss of work effort. Changing network servers and phone systems and phone numbers adds to the loss in terms of short-term performance. Relocating facilities, restructuring personnel assignments and lines of authority often entail dislocations that can take months or even years to fully recover from. If there is a clear case for greater focus and long term efficiency these costs may be acceptable so long as they do not reduce performance during periods of potential threat.

Any reorganization should carefully weigh these factors with respect to both the entities to be transferred to the new department and the timing of that transfer.

Fiscal Year 2004 Budget Presentation

The Committee expects that the President's fiscal year 2004 budget submission will reflect the newly created department of homeland security and its component agencies, consistent with statements made by the Administration. Budget estimates and accompanying justification materials shall be prepared and submitted in the same manner and level of detail as provided previously to the Committee on Appropriations for the department's component agencies, programs and activities.

EXPRESSION OF VIEWS ON OTHER MATTERS OUTSIDE THE APPROPRIATIONS COMMITTEE'S JURISDICTION

Sec. 733(a) of the bill authorizes the Secretary to "establish, consolidate, alter, or discontinue" any organizational units of the

Department. The provision expressly allows consolidating or abolishing organizations and entities established by statute, provided only that 90 days advance notice is given to Congress. Though the bill does prohibit the use of its section 733(a) authority to eliminate specific agencies (e.g., the Coast Guard and the Secret Service), there is no such prohibition on abolishing various other agencies transferred to the Department, such as the Animal and Plant Health Inspection Service and the Customs Service, thereby allowing the Secretary to unilaterally overturn longstanding policies set in law. Congress should not authorize the Executive Branch to establish, consolidate, alter, or discontinue any agency of government that was established by statute. To do so would be tantamount to allowing the executive branch to unilaterally amend existing laws, and therefore contrary to the constitutional principles that vest legislative power in Congress rather than the President.

RECORDED VOTES IN COMMITTEE

During consideration of the Committee's recommendations and views on H.R. 5005, there were no recorded votes taken in the Committee.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds the Constitutional authority for this legislation in Article I, clause 8, section 18, that grants Congress the power to make all laws necessary and proper for carrying out the powers vested by Congress in the Government of the United States or in department or officer thereof.

OVERSIGHT STATEMENT

No summary of oversight findings and recommendations made by the Committee on Government Reform, as provided for in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, was available to the Committee with reference to the subject matter specifically addressed in the Committee amendment proposed to H.R. 5005.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Appropriations' oversight findings and recommendations are reflected in the body of this report.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act will be created by the amendment recommended by the Committee on this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the recommended amendment to the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104-1).

FEDERAL MANDATES STATEMENT

The amendment recommended by the Committee on this legislation contains no unfunded mandates.

CHANGES IN EXISTING LAW

The amendment recommended by the Committee on this legislation would make no change in existing law.

CONGRESSIONAL BUDGET ACT

With respect to the requirement of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, and section 308(a) of the Congressional Budget Act of 1974, the Committee amendment would not result in the provision of any new budget authority.